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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1962

No. ~~1019~~ 162

UNITED STATES OF AMERICA,

Appellant,

v.

NELSON WOODSON, ET AL.,

Appellees.

MOTION BY APPELLEES TO DISMISS OR AFFIRM

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Appellees.

MOTION BY APPELLEES TO DISMISS OR AFFIRM

This case was appealed by the United States to the Court of Appeals for the District of Columbia Circuit and was certified here by that Court, pursuant to the Criminal Appeals Act (18 U.S.C. §3731). Appellees hereby move that the appeal be dismissed for want of jurisdiction or, in the alternative, that the order appealed from be affirmed on the merits.

The Rules of this Court do not specifically provide the procedure to be followed in a case certified to this Court by a court of appeals under the Criminal Appeals Act. We have been informed by the Office of the Clerk that a jurisdictional statement is not filed by the appellant, as would be done if a direct appeal were taken to this Court, and that a motion such as this may be filed by the appellees. For the convenience of the Court, we have included in this motion some matters normally found in the jurisdictional statement, such as the opinions below.

Opinions Below

The opinion of the District Court for the District of Columbia (J.A. 10–17)[1] is reported at 198 F. Supp. 582. The opinion of the Court of Appeals, not yet reported, is appended hereto as Appendix A, and an Order of the Court of Appeals modifying its opinion is appended hereto as Appendix B.

Questions Presented

In its brief filed in the Court of Appeals, the Government stated that:

> "The sole question presented on this appeal is whether:
>
> "Assuming *arguendo* that the individual defendants were properly indictable under Section 14 of the Clayton Act rather than Section 3 of the Sherman Act, the district court erred in dismissing the indictment against the individual defendants on the ground that the indictment was duplicitous within the meaning of Rule 8(a) of the Federal Rules of Criminal Procedure, in charging the corporate defendants with a violation of Section 3 of the Sherman Act and the individual defendants with a violation of Section 14 of the Clayton Act in a single count, and that therefore Rule 7(c) of the Federal Rules of Criminal Procedure was not applicable."

On this motion to dismiss or affirm the questions presented are:

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[1] All record references herein are to the Joint Appendix attached to the Brief for Appellant in the Court of Appeals.

1. Does this Court have jurisdiction under the Criminal Appeals Act of the question thus presented by the Government in the Court of Appeals?

2. Should the Government be permitted to raise in this Court the issue of whether the Sherman Act may apply to corporate officers for actions taken in their capacities as such officers even though that issue was not raised by the Government in its appeal to the Court of Appeals?

3. If this Court has jurisdiction of the question presented by the Government in the Court of Appeals, would the single-count indictment be duplicitous if construed as charging appellees with violations of section 14 of the Clayton Act while charging other defendants with violations of section 3 of the Sherman Act?

4. If the Government is permitted to raise the issue in this Court, may the Sherman Act be applied to corporate officers for actions taken in their capacities as such officers?

Statutes and Rules Involved

Set forth in Appendix C hereto are the relevant portions of the Criminal Appeals Act, 18 U.S.C. §3731; section 3 of the Sherman Act, 15 U.S.C. §3; section 14 of the Clayton Act, 15 U.S.C. §24; Rule 7(c) F.R.Cr.P.; and Rule 8(a) F.R.Cr.P.

Statement

The indictment contains a single count which charges eight corporations and six individuals with a conspiracy in unreasonable restraint of trade and commerce within the District of Columbia in violation of section 3 of the Sherman Act (J.A. 2–7). The corporate defendants are local dealers in building materials and the individual defendants are officers of one or more of the corporations. In response to a motion for a bill of particulars, the Government stated

(J.A. 9) that ". . . according to its present information the individual defendants concerned are indicted under 15 U.S.C. §3 in their capacity as directors, officers or agents of their respective corporations for authorizing, ordering or doing the acts constituting the violations committed by their corporations. They are not indicted as individuals acting for their own personal account."

The individual defendants, appellees here, moved to dismiss the indictment as to them on the ground that the Sherman Act does not apply to such acts by corporate officers in their representative capacities and that appellees could be charged for such acts, if at all, only under section 14 of the Clayton Act (J.A. 8-9). Judge McLaughlin, in granting the motions and dismissing the indictment as to appellees, relied heavily upon the decision in *United States* v. *National Dairy Products Corp.*, 196 F. Supp. 155 (W.D. Mo.), which was characterized as being "directly in point upon the issues raised" so as to justify what might otherwise "appear to be an oversimplification to cite; quote and rule upon" the basis of the one opinion. 198 F. Supp. 582, 583. In concluding his opinion, Judge McLaughlin stated that: "It is the judgment of the Court that the indictment in so far as it relates to the individual defendants should be dismissed on the ground that it does not, as to the individual defendants, state an offense under Section 3 of the Sherman Act." *Id.*, at 586. The order dismissing the indictment as to appellees, entered October 13, 1961, recited that the dismissal was "for the reasons set forth" in the District Court's opinion (J.A. 18).

The dismissal of the individual defendant in the *National Dairy* case was appealed directly to this Court by the Government, probable jurisdiction was noted *sub nom. United States* v. *Wise*, 368 U.S. 945, and the appeal is now awaiting decision after briefing and oral argument. The Govern-

ment's Jurisdictional Statement in that case identified the question presented as: "Whether a corporate officer may be prosecuted under Section 1 of the Sherman Act for antitrust violations committed in the course of his corporate duties." Appellees do not doubt that this Court would have had jurisdiction, under the Criminal Appeals Act, of the appeal in this case if the Government had followed the course clearly marked out by its appeal from the virtually identical decision in the *National Dairy* case. For reasons best known to itself, however, the Government deliberately elected to follow a different course in this case.

The Government noted an appeal to the Court of Appeals for the District of Columbia (J.A. 19-20) rather than to this Court. In its Statement of Points filed with the Court of Appeals, as required by Rule 15 of that Court, the Government stated that the "sole point relied upon by the United States of America on this appeal is" as follows:

> "Assuming *arguendo* that the individual defendants were properly indictable under Section 14 of the Clayton Act rather than Section 3 of the Sherman Act, the district court erred in dismissing the indictment against the individual defendants on the ground that the indictment was duplicitous within the meaning of Rule 8(a), Federal Rules of Criminal Procedure, in charging the corporate defendants with a violation of Section 3 of the Sherman Act and the individual defendants with a violation of Section 14 of the Clayton Act in a single count, and that therefore Rule 7(c), Federal Rules of Criminal Procedure, was not applicable."

This "sole point relied upon by the United States of America" on its appeal was repeated *verbatim* in the Government's brief in the Court of Appeals as "the sole question presented on this appeal." See p. 2, *supra*.

The Government in this appeal thus intentionally refrained from raising the Sherman Act issue such as was raised in the Jurisdictional Statement filed in the *National Dairy* or *Wise* case. Indeed, the Government so conceded in its Reply Brief below (p. 5, fn. 2), stating that it "deliberately refrained from arguing the statutory construction question here" because "we recognized that had we done so this court undoubtedly would have deferred action upon the entire appeal until after the Supreme Court's decision in the *Wise* case" and because "we believe an early determination of the duplicity question may be of value not only with respect to similar indictments now pending but as guidance in passing upon duplicity questions which might be raised with respect to separate Section 14 grounds filed against corporate officials." The "duplicity question" arose as a result of the Government's contention in the District Court that the citation of section 3 of the Sherman Act as the charging statute could be treated as an *error correctable under Rule 7(c) F.R.Cr.P.* so as to charge a section 14 Clayton Act offense, in the event that the District Court rejected the Government's basic argument that the Sherman Act is applicable to corporate officers such as appellees.[2] The trial court concluded that it need not decide whether Rule 7(c) might otherwise be applied as contended by the Government because so to construe the indictment would render it duplicitous in violation of Rule 8(a) F.R.Cr.P. 198 F. Supp. 582, 585-586.

The Criminal Appeals Act provides, *inter alia*, that the Government may appeal a decision or judgment dismissing an indictment directly to the Supreme Court "where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment . . . is

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[2] A similar argument could have been but was not made in the *National Dairy* case.

founded," and may appeal to the appropriate court of appeals "except where a direct appeal to the Supreme Court of the United States is provided by this section." 18 U.S.C. §3731. The Act has been consistently construed as not authorizing a direct appeal to this Court "where the District Court has considered the construction of the statute but has also rested its decision upon the independent ground of a defect in pleading which is not subject to . . . examination [by the Supreme Court]." *United States* v. *Borden Co.*, 308 U.S. 188, 193. *See, e.g., United States* v. *Hvass*, 355 U.S. 570, 573-574; *United States* v. *Wayne Pump Co.*, 317 U.S. 200, 208.

The Government argued in the Court of Appeals that the District Court had held the indictment to be duplicitous and that this defect in the pleading constituted an independent ground which the Supreme Court would not review, so that the Court of Appeals had jurisdiction of the appeal. Appellees contended that the sole ground for the dismissal, as plainly stated in the next to last paragraph of the District Court's opinion (198 F. Supp. 582, 586), was a construction of the Sherman Act as not applying to corporate officers such as appellees, which ruling could have been appealed directly to the Supreme Court, so that the Court of Appeals did not have jurisdiction.[3] The Court of Appeals agreed with appellees, stating (App. A, at p. 18) that:

> "In this case, it seems clear that the District Court's dismissal of the indictment as to the individuals was

[3] Appellees also contended that if the trial court had held the indictment to be duplicitous and grounded the dismissal in part on that holding, jurisdiction of an appeal nevertheless would be in the Supreme Court rather than the Court of Appeals because such a holding under the circumstances would not be an *independent* ground for dismissal as it depended upon an initial construction of the Sherman Act as not applying to appellees.

based upon a construction of Section 3 of the Sherman Act, upon which the indictment was founded. The trial judge construed that section as inapplicable to corporate officers as to acts done in their representative capacities, and so dismissed as to them."

Neither the Government nor appellees argued before the Court of Appeals the merits of the District Court's construction of the Sherman Act as not applying to corporate officers such as appellees. Appellees contended that the appeal should be dismissed outright, rather than certified to this Court, because the Government had not raised the only issue that could be considered by this Court—the statutory construction issue—and certification would serve no purpose. Cf., *United States* v. *Fruehauf*, 365 U.S. 146, 157. The opinion of the Court of Appeals initially provided for such a dismissal (App. A. p. 18), but was subsequently amended in response to a motion by the Government to order certification to this Court (App. B, at p. 19). In its motion, at p. 2, the Government contended that the "issue of the proper interpretation of Section 3 of the Sherman Act is properly presented for decision in this case," even though that issue had not been raised before the Court of Appeals. The order of the Court of Appeals amending its opinion to provide for certification did not indicate the basis for that action, other than by quoting the Criminal Appeals Act with emphasis on the word "shall" in the provision that a court of appeals "shall certify the case to the Supreme Court" if of the opinion that the appeal should have been taken directly to this Court (App. B, at p. 19).

Argument

1. *This Court Does Not Have Jurisdiction of the Only Issue Raised by the Government in Taking the Appeal.* The "sole point relied upon by the United States on this appeal" and the "sole question presented on this appeal" was definitively stated by the Government in the Court of Appeals to be whether the District Court erred in dismissing the indictment as to appellees "on the ground that the indictment was duplicitous." We believe that the Court of Appeals was correct in holding that the District Court did not dismiss the indictment on the ground that it was duplicitous, but in any event this Court clearly does not have jurisdiction under the Criminal Appeals Act to review any such ruling.

From the beginning, this Court has held that it does not have jurisdiction under the Criminal Appeals Act to review a ruling of the trial court with respect to the construction to be given to, or the sufficiency of, an indictment or information. *United States* v. *Jones*, 345 U.S. 377, 378; *United States* v. *Hastings*, 296 U.S. 188, 192-193; *United States* v. *Keitel*, 211 U.S. 370, 397-399. Thus, this Court does not have jurisdiction to review a ruling that a count in an indictment must be dismissed as duplicitous. *United States* v. *Borden Co.*, 308 U.S. 188, 193; *United States* v. *Meyer*, 266 F.2d 747, 755 (C.A. 5). If the trial court in fact had dismissed the indictment as to appellees upon the independent ground that the indictment was duplicitous, this Court presumably would refuse the certification by the Court of Appeals and return the case to that Court for decision of the duplicity issue. Cf., *United States* v. *Mersky*, 361 U.S. 431, 438. But since the indictment was not dismissed on the basis that it was duplicitous so as to give the Court of Appeals jurisdiction, but on the basis of a

construction of the Sherman Act which was not challenged by the Government in the Court of Appeals, we believe that this Court should dismiss the appeal unless the Government is permitted to raise the Sherman Act issue in this Court.

"2. *The Issue as to the Construction of the Sherman Act Has Not Been Properly Raised by the Government and Should Not Be Considered on this Appeal.* It was "the judgment of the [District] Court that the indictment in so far as it relates to the individual defendants should be dismissed on the ground that it does not, as to the individual defendants, state an offense under Section 3 of the Sherman Act." 198 F. Supp. 582, 586. Appellees contended in the Court of Appeals, which so held, that the Government might have appealed that ruling directly to this Court under the plain language of the Criminal Appeals Act, just as was done in the *National Dairy* or *Wise* case. We do not now contend any differently. We do contend that the Government should not be allowed to raise the issue in this Court when it concededly "deliberately refrained" from doing so in the Court of Appeals, stating that the "sole point relied upon by the United States on this appeal" and the "sole question presented on this appeal" was the purported issue with respect to duplicity, and neither briefed nor argued the Sherman Act issue in that Court.

Subparagraph 1(c)(1) of Rule 15 of this Court requires a jurisdictional statement filed on appeal to include a statement of the questions presented, and provides that: "Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court." Subparagraph 1(c) of Rule 23 of this Court contains a similar provision with respect to petitions for a writ of certiorari. We take it to be established, therefore, that

this Court would not consider the issue with respect to the construction of the Sherman Act if the Government had taken a direct appeal to this Court by filing a jurisdictional statement in which the "sole question presented on this appeal" was that set forth by the Government in its brief in the Court of Appeals—*i.e.*, whether the District Court erred on the duplicity issue.[4]

The fact that the Government sought to appeal to the Court of Appeals should not, we submit, lead to a different result. The Rules of this Court do not provide for a situation in which an appeal under the Criminal Appeals Act is certified by a court of appeals to this Court, but we understand that a jurisdictional statement is not filed and none has been filed in this case. Consequently, the function performed by the jurisdictional statement on a direct appeal must be performed by the Government's brief in the Court of Appeals.[5] The certification provision in the Criminal Appeals Act was "intended to save to the Government the right of appeal which might otherwise be lost by

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[4] "Only issues raised by the jurisdictional statement or petition for certiorari, as the case may be, are considered by the Court." *Phillips Co. v. Dumas School Dist.*, 361 U.S. 376, 386, fn. 12. See also, *United States v. Fruehauf*, 365 U.S. 146; *Braniff Airways v. Nebraska Board*, 347 U.S. 590, 597, fn. 14.

[5] When a direct appeal is taken to this Court, the notice of appeal must specify the questions presented and only those questions will be considered by the Court. Rule 10 of the Supreme Court. On the other hand, when an appeal is taken to a court of appeals the notice of appeal is not required to specify the questions presented. Rule 37(a)(1) F.R.Cr.P. Thus, the Notice of Appeal in this case merely specifies the offense charged and the order appealed from (J.A. 19-20). Rule 15 of the Court of Appeals, however, requires an appellant to file a statement of the points on which it intends to rely on appeal, and Rule 17(g) of that Court provides that points not presented in accordance with the rules "will be disregarded, though the court, at its option, may notice and pass upon a plain error not pointed out or relied upon." Hence, the combined notice of appeal and statement of points in the Court of Appeals performs the same functions as are performed by the notice of appeal alone in this Court. The Government raised only the duplicity issue in its Statement of Points.

its erroneous view as to the proper appellate tribunal." *United States* v. *Wayne Pump Co.*, 317 U.S. 200, 209. Insofar as we are aware, however, there is no suggestion in the Act, its legislative history or the decisions that the certification provision was intended to permit the Government to argue one issue in the court of appeals and an entirely different issue here.

There is no legal justification for the Government's failure to raise the Sherman Act issue in the Court of Appeals. Rule 17(b)(1) of that Court requires an appellant to set forth in its brief "a statement of the question or questions presented to the Court for decision," and provides that the "Court in its discretion may decline to consider a question not set forth in accordance with this paragraph." Moreover, the Sherman Act issue could have been raised and decided in the Court of Appeals if the Government had been correct in its contention that that Court had jurisdiction of the appeal because the dismissal of the indictment as to appellees was based in part on a ruling that the indictment was duplicitous. Where dismissal of an indictment is based upon a defect in the pleading as well as upon the construction of a statute, so as to authorize appeal under the Criminal Appeals Act to a court of appeals rather than to this Court, the court of appeals has "authority to pass upon the construction both of the indictment and the statute." *United States* v. *Swift & Co.*, 318 U.S. 442, 445.

Thus, the failure of the Government to raise the Sherman Act issue was not a consequence of "its erroneous view as to the proper appellate tribunal" for which the certification provision of the Criminal Appeals Act was intended to provide a remedy. Rather, as the Government itself has stated, it "deliberately refrained from arguing the statutory construction issue" in the Court of Appeals in an effort to avoid a deferral of decision due to the pendency

of the Sherman Act issue in this Court in the *Wise* case and to obtain an early determination of the duplicity question by the Court of Appeals. See p. 6, *supra*. As a result, appellees have been caused much needless effort and expense and will have been subjected to an inordinate delay if eventually required to go to trial under the indictment. Cf., Sixth Amendment to the Constitution of the United States. We submit that it would be grossly unfair to appellees for this Court to extricate the Government from its own deliberate stratagem by allowing the Government to raise here the Sherman Act issue which was intentionally omitted in the court below. As this Court stated in *Carroll* v. *United States*, 354 U.S. 394, 400, "in the federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored. The history shows resistance of the Court to the opening of an appellate route for the Government until it was plainly provided by the Congress, and after that a close restriction of its uses to those authorized by the statute." Certainly, we find nothing in the Criminal Appeals Act or any other statute authorizing the Government upon certification of a case to raise in this Court an issue which it "deliberately refrained" from raising in the certifying court.

3. *If this Court Has Jurisdiction, the Order of the District Court Should Be Affirmed.* The issue with respect to whether the Sherman Act may apply to actions taken by corporate officers, directors or agents in the course of their corporate duties has been briefed and argued before this Court in *United States* v. *Raymond J. Wise*, No. 488, October Term, 1961, and was pending for decision as of the date this Motion was written. While the indictment in the *Wise* case was brought under section 1 of the Sherman Act and the indictment in this case was brought under section

3 of that Act, this is not a material distinction for purposes of the issue in question. In general, section 3 merely extends to trade and commerce with or within the District of Columbia or the territories the provisions of section 1 which relate to interstate trade and commerce, and the same interpretation is given to the two sections. See *United States* v. *Real Estate Boards*, 339 U.S. 485. Thus, if this Court finds that it has jurisdiction of the appeal and considers the Sherman Act issue, the ruling of the District Court on that issue should be affirmed for the reasons stated by the appellee in the *Wise* case.

The District Court was clearly right in concluding that the indictment would be duplicitous if construed as charging appellees under section 14 of the Clayton Act while charging the corporate defendants under section 3 of the Sherman Act. The indictment contains only one count. Rule 8(a) F.R.Cr.P. provides in effect that two or more related offenses may be charged in the same indictment or information "in a separate count for each offense." Rule 8(a) was "substantially a restatement of existing law." Notes of Advisory Committee, 18 U.S.C.A. after Rule 8; *Rakes* v. *United States*, 169 F. 2d 739, 743 (C.A. 4). The federal courts have consistently held, both prior and subsequent to the adoption of Rule 8(a), that a count which charges two or more separate and distinct offenses is bad for duplicity and must be dismissed if properly challenged. See Orfield, *Joinder in Federal Criminal Procedure*, 26 F.R.D. 23, 30-35, 62-65, and cases there cited. *Curtis* v. *United States*, 38 F.2d 450, 451 (C.A. 5), held an indictment to be duplicitous where, in one count, some defendants were charged with smuggling and other defendants were charged with concealing the smuggled property.

Section 3 of the Sherman Act and section 14 of the Clay-

ton Act were enacted at different times as separate statutes; provide different punishments, and require different proof. Hence, the two offenses plainly are separate and distinct. See, *e.g.*, *Bollenbach* v. *United States*, 326 U.S. 607, 610-611; *Creel* v. *United States*, 21 F.2d 690, 691 (C.A. 8); *United States* v. *Shackelford*, 180 F. Supp. 857, 859-860 (S.D. N.Y.); *United States* v. *Martinez-Gonzales*, 89 F. Supp. 62 (S.D. Cal.). Should this Court decide that it has jurisdiction of the duplicity issue, therefore, the conclusion of the District Court with respect to that issue should be affirmed. We may note, however, that there are reasons apart from duplicity for holding that the indictment cannot be construed, pursuant to Rule 7(c) F.R.Cr.P., as charging an offense under section 14 of the Clayton Act. The District Court did not find it necessary to consider those reasons in view of its conclusion that the indictment would duplicitous if so construed, and we see no need to present them on this Motion. They were presented in the Court of Appeals, however, and appellees reserve the right to present them here by brief and argument should this Motion be denied.

Conclusion

For the reasons stated above, we believe that this Court should dismiss the appeal for want of jurisdiction and that the judgment below should be summarily affirmed should this Court conclude that it has jurisdiction.

Respectfully submitted,

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APPENDIX A

Before WILBUR K. MILLER, *Chief Judge*, and BASTIAN and BURGER, *Circuit Judges*.

PER CURIAM: An indictment charged that eight District of Columbia construction companies and six individuals had conspired to restrain trade, in violation of Section 3 of the Sherman Act. The individuals, who concededly had acted only as corporate officers, moved to dismiss as to them, and the District Court granted their motion, holding that corporate officers may not be indicted under Section 3 of the Sherman Act for acts done in their representative capacities and that therefore, the indictment did not state an offense under the Sherman Act as to the individuals.

The Government argued that the charge against the individuals was nevertheless properly included because Section 14 of the Clayton Act, which was not mentioned in the indictment, makes their alleged acts criminal, even though Section 3 of the Sherman Act does not. In rejecting this contention, the District Court pointed out that such a construction of the indictment would result in dismissal because of duplicity. The Government appeals from the order dismissing the indictment as to the individuals.

The Government's right to appeal to this court from the dismissal of an indictment derives from the Criminal Appeals Act, 18 U. S. C. § 3731, of which the following is pertinent:

> "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> "From a decision or judgment setting aside, or dismissing any indictment or information, on any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

* * * * * * *

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section."

In this case, it seems clear that the District Court's dismissal of the indictment as to the individuals was based upon a construction of Section 3 of the Sherman Act, upon which the indictment was founded. The trial judge construed that section as inapplicable to corporate officers as to acts done in their representative capacities, and so dismissed as to them. According to the plain provisions of the statute, the Government might appeal from such a judgment "direct to the Supreme Court of the United States." In such circumstances, an appeal to this court is not authorized or permitted. It follows that these appeals must be dismissed for lack of jurisdiction.

If it were otherwise, we should be constrained to affirm on the basis of District Judge McLaughlin's opinion, *United States* v. *A. P. Woodson Company, et al.*, 198 F. Supp. 587 (1961).

Appeals Dismissed.

APPENDIX B

Before: WILBUR K. MILLER, *Chief Judge*, and BASTIAN and BURGER, *Circuit Judges*.

ORDER

It is ORDERED by the court that the opinion filed in this case April 27, 1962, is amended as follows:

On page 3, strike the following language at the end of the opinion:

> It follows that these appeals must be dismissed for lack of jurisdiction.
>
> If it were otherwise, we should be constrained to affirm on the basis of District Judge McLaughlin's opinion, United States v. A. P. Woodson Company, et al., 198 F. Supp. 582 (1961).
>
> *Appeals dismissed.*

At the end of the opinion insert the following new paragraph, conclusion, and footnote 1:

> It follows that these appeals must, under 18 U.S.C. §3731, be certified to the Supreme Court of the United States which has "jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that court."[1]
>
> *Case certified to the Supreme Court of the United States.*
>
> Per Curiam.

Dated: Jun 1 1962.

---

[1] If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court *shall* certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court. June 25, 1948, c. 645, 62 Stat. 855, amended May 24, 1949, c. 139, §58, 63 Stat. 97." 18 U.S.C. §3731.

APPENDIX C

Criminal Appeals Act, 18 U.S.C. § 3731:

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision of judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

* * * * * * *

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

* * * * * * *

If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

Section 3 of Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U. S. C. § 3:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the

District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 14 of Clayton Act, 38 Stat. 736, 15 U.S.C. § 24:

Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction thereof of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

Rule 7(c) F.R.Cr.P.:

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be grounds for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

Rule 8(a) F.R.Cr.P.:

Two or more offenses may be charged in the same indictment or information in separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 162

UNITED STATES OF AMERICA, APPELLANT

v.

NELSON WOODSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE UNITED STATES IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

This appeal involves the validity of an order of the district court dismissing an indictment under the Sherman Act as to corporate officials, on the ground that they may be prosecuted only under Section 14 of the Clayton Act. The government appealed from that judgment to the court of appeals, which certified the case to this Court under 18 U.S.C. 3731. Appellees urge that the appeal should be dismissed, on the ground that in the court of appeals the government abandoned any challenge to the foregoing ruling

of the district court.[1] If, however, as we shall show, the government did not waive that point in the court of appeals, then the case is properly before this Court, and the judgment of dismissal should be summarily reversed on the authority of *United States* v. *Wise*, No. 488, O.T., 1961, decided June 25, 1962. See *United States* v. *Kniss & Marsters* and *United States* v. *Staley*, Nos. 762 and 882, O.T., 1961, decided June 25, 1962.

STATEMENT

On May 16, 1961 a single count indictment was returned charging eight corporations and six individual officers thereof with violating Section 3 of the Sherman Act, 15 U.S.C. 3. The individual defendants (appellees here) moved to dismiss the indictment as to them on the ground that they could not be prosecuted under Section 3 of the Sherman Act for acts performed in their capacity as corporate officials, because such acts were punishable only under Section 14 of the Clayton Act. In opposing these motions, the government argued that the individual defendants could be prosecuted under Section 3; but that in any event the indictment should not be dismissed as to them, because it alleged facts constituting a violation of Section 14 by them. Since miscitation of a

[1] Appellees alternatively urge (Motion to Dismiss or Affirm, p. 14) that "the ruling of the District Court * * * should be affirmed for the reasons stated by the appellee in the *Wise* case." On June 25, 1962, however, this Court held in *Wise*, No. 488, O.T., 1961, that corporate officials may be prosecuted under the Sherman Act for antitrust violations committed in their corporate capacity.

statute in an indictment is not ground for dismissal unless a defendant can show prejudice (Rule 7(c) of the Federal Rules of Criminal Procedure), the government asserted that the indictment should be deemed to charge an offense against the individuals under Section 14.

The district court held that the individual defendants could not be indicted under Section 3 of the Sherman Act for acts performed in their representative capacity. It rejected the government's alternate argument that the indictment could be read as charging a violation of Section 3 by the corporations and Section 14 by the individual defendants, on the ground that such an interpretation would make the indictment duplicitous under Rule 8(a) of the Federal Rules of Criminal Procedure by charging two offenses in a single count. The court thereupon entered an order dismissing the indictment as to the individual defendants.

Because in the government's view the district court's ruling on duplicity was an independent, non-statutory ground for dismissal of the indictment, the government appealed under 18 U.S.C. 3731 to the Court of Appeals for the District of Columbia Circuit rather than to this Court. See *United States* v. *Borden Co.*, 308 U.S. 188, 193; *United States* v. *Wayne Pump Co.*, 317 U.S. 200, 208. In its notice of appeal the government appealed "from the * * * order dismissing the indictment against the individual defendants." However, because of the government's desire to obtain "an early determination of the duplicity question" (Reply Brief for Appellant, p. 5, n. 2), it

urged in its brief that the judgment of dismissal should be reversed upon that narrow ground, and did not argue the broader issue of liability under the Sherman Act, which was then pending before this Court in *United States* v. *Wise*, No. 488, October Term, 1961. The government stated in its main brief below (pp. 7–8 and fn. 2), that it "obviously believes that the District Court erred" on the statutory issue, and that if the court of appeals reversed on the duplicity ground, this would reinstate the indictment and leave it for the district court to determine, on the basis of this Court's decision in *Wise*, whether the appellees were charged under the Sherman or the Clayton Act. In its reply brief (pp. 4–5), the government further urged that if the court of appeals disagreed with its view of the lower court's ruling, the court's "duty under the express provisions of the Criminal Appeals Act" was to certify the case to this Court.

In a *per curiam* opinion issued on April 27, 1962, the court of appeals rejected the government's contention that the duplicity issue was properly presented for decision. It held that the district court's dismissal of the indictment "was based upon a construction of Section 3 of the Sherman Act, upon which the indictment was founded," and that "[a]ccording to the plain provision of the statute [Criminal Appeals Act], the Government might appeal from such a judgment 'direct to the Supreme Court of the United States.' In such circumstances, an appeal to this court is not authorized or permitted."

The opinion below, as originally filed, directed dismissal of the appeal for lack of jurisdiction. The

government then filed a Motion for Modification of Judgment and for Certification to the Supreme Court in which it pointed out that since the court of appeals had held that the only issue in the case was the construction of the Sherman Act, and since that issue had been raised by the government's appeal, the proper disposition under the Criminal Appeals Act was not dismissal, but certification to this Court.

Appellees strenuously opposed the motion. They urged that "the Government abandoned any right to review of the lower court's construction of the Sherman Act by failing to include that issue in its Statement of Points and its Statement of Questions Presented" (p. 5) and that "the Government has not properly raised any issue that may be reviewed by the Supreme Court" (p. 6).

The court of appeals granted the government's motion and modified its opinion to provide for certification of the case to this Court.

ARGUMENT

Appellees urge dismissal of the appeal on the ground that the government abandoned in the court of appeals its challenge to the ruling of the district court that corporate officials cannot be prosecuted under the Sherman Act for antitrust violations committed in their corporate capacities. Appellees made the identical argument in the court of appeals in opposing the government's motion to have the case certified to this Court. The court below rejected that argument when it certified the case. That court was the forum best qualified to ascertain whether the government had

waived a particular issue before it, and it correctly ruled that the government had not waived the point.

As set forth in the Statement, *supra*, the government urged the court of appeals to reverse on a narrow ground, since such reversal would avoid the need for reaching the broader statutory question which was then pending before this Court in *Wise*. But the government did not thereby explicitly or implicitly waive its contention that the district court had misinterpreted the Sherman Act in ruling that corporate officials could not be prosecuted thereunder. On the contrary, the government specifically pointed out that it "obviously believes that the District Court erred" in the latter ruling. It also noted that, if the court of appeals accepted the argument on the narrow duplicity point, the question whether appellees should be prosecuted under the Sherman Act or the Clayton Act would remain open in the district court, to be decided on the basis of this Court's decision in *Wise*. The government did not waive the statutory issue, which was then pressing in this Court in *Wise* and on which it had appealed to this Court in other cases (see *supra*, p. 2), merely because it urged the court of appeals to reverse the dismissal in this case on a narrower ground. Cf. *Barr* v. *Matteo*, 355 U.S. 171.

CONCLUSION

This appeal properly presents the issue whether corporate officials may be prosecuted under the Sherman Act for antitrust violations committed in their cor-

porate capacities. The district court's ruling that they may not be so prosecuted is contrary to this Court's holding in the *Wise* case, and the judgment of dismissal should be reversed on the authority of the latter decision. See the *Staley* and *Kniss* cases, *supra*, p. 2.

Respectfully submitted.

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JULY 1962

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